given evidence) should be called or recalled for examination or cross-examination on the point on return to Court.

The less said on a view the better, but I do not wish to lay it down that comment by an advocate in the presence of the opposite party or his counsel would vitiate the proceedings.

The whole purpose of a view is to enable the Magistrate to follow the evidence given in Court and to help him to arrive at the truth.

But I do not think it safe to lay down any rigid rule for the conduct of a view. Something must be left to the Magistrate's discretion and so long as everything said or done is said or done openly in the presence of the accused and his counsel and is interpreted to the accused, if necessary, and so long as any new matter or new aspect arising during the view is tested by examination or cross-examination on return to Court there would be no irregularity in the trial nor would there be any ground for suspecting that justice did not appear to be done.

I would add that if counsel having been informed of the time and place of the view does not attend his non-attendance would no more vitiate the proceedings than would his non-attendance at an adjourned hearing in Court.

Appeal allowed.

[APPELLATE CRIMINAL JURISDICTION]

McELWAINE, C.J.

March 2, 1938.

EDITH LILIAN WOOSEY.....Appellant.

v.

SYDNEY ARTHUR JOSEPH WOOSEY

.....Respondent.

[SINGAPORE MAGISTRATE'S APPEAL No. 6 of 1938]

Maintenance orders—reciprocal enforcement —District Judge's refusal to enforce order— Appeal—Reciprocal Enforcement of Maintenance Orders Ordinance (Cap. 47) S. 3; Minor Offences Ordinance (Cap. 24) S. 37 sub-s. 4.

A maintenance order, passed by the English High Court of Justice against the respondent, was registered in the Criminal District Court under Section 3 of the Reciprocal Enforcement of Maintenance Orders Ordinance. On default being made by the respondent in the payment of a sum of £100 payable under the order, a summons was issued to him calling upon him to shew cause why action should not be taken against him under S. 37 sub-s. 4 of the Minor Offences Ordinance. The respondent shewed cause. After hearing the evidence and what was alleged by counsel on both sides, the District Judge refused to enforce the order. Against this refusal the appellant appealed.

Held, that it is not competent for the District Judge to question the validity of a maintenance order, regularly issued by the High Court of Justice in England and duly registered in the District Court in pursuance of the Reciprocal Enforcement of Maintenance Orders Ordinance.

Held further that, on the District Judge refusing to make an order on the summons to shew cause, an appeal lies to the High Court against such refusal, and that the appellate Court has power, if considered convenient and just, to remit the case to the District Judge for further hearing and reconsideration on a different basis of fact.

MAGISTRATE'S APPEAL.

Walters for Mrs. Woosey and, under fiat, for the Crown so far as interested.

The Maintenance Order in question in this case was made on the 24th March, 1937, by the President of the Probate, Divorce and Admiralty Division, of the High Court in England. It is enforceable under the Reciprocal Enforcement of Maintenance Orders Ordinance (Cap. 47) s. 3, "as if it had been an order originally obtained in the District Court." It is therefore enforceable as provided by s. 37 (4) of the Minor Offences Ordinance (Cap. 24). The decision appealed from was made on application under that subsection.

Chew Cheng Swee v. *Chan Chye Neo*, 1931, S.S.L.R. 187, (1932) 1 M.L.J. 5 shows that there is an appeal from the District Court by either party concerned in such an application, as the matter is of a criminal nature. The Criminal Procedure Code, s. 302 (1), therefore, gives a right of appeal to this Court.

Mrs. Woosey and or the Crown are dissatisfied with the judgment sentence or order pronounced by the District Court and so bring this appeal under the last mentioned section.

[**McELWAINE, C. J.**—This appeal is not an appeal by the Public Prosecutor. Are you not precluded therefore from appealing by reason of s. 300 (1) of the Criminal Procedure Code, which lays down that when an accused person has been acquitted there shall be no appeal except by the Public Prosecutor?]

No. It cannot be said that Woosey was "acquitted" within the meaning of s. 300 (1) of the Criminal Procedure Code. "Acquitted" in that section has its ordinary meaning as popularly used in connection with criminal cases. s. 302 of the Criminal Prosedure Code clearly shows that criminal cases in the District Court may end otherwise than by conviction or acquittal, and this case so ended.

[**McELWAINE, C.J.**—Could you not go back and make a new application and is not this appeal unnecessary?]

We could go back, but I contend that it would be wrong to send us back on a new application, in view of the grounds of decision of the learned District Judge, which show that he has misapprehended his rights and duties in such an application. He says, "In my opinion I should not enforce the order of the High Court. There is nothing to show why the High Court ordered payment of £20 p.m. and disregarded defendant's offer. The cost of an appeal might

have been prohibitive. In my opinion £10 per month is as much as defendant can pay (within reason)." But the District Judge had no right to say that he will not enforce the Order of the High Court. See *R* v. *Lancashire Justices*, (1925) 1 K.B. 200. The Order made in England was such an Order as is referred to in s. 3 of the Reciprocal Enforcement of Maintenance Orders Ordinance (Cap. 47). Contrast the case of provisional orders which are dealt with under s. 6 of the same Ordinance. The District Judge is obliged to proceed on the footing that the Order in England was rightly made, and is unchangeable after due registration in accordance with the statutory procedure, in this Court. It is common ground that such procedure was followed in this particular case.

The proper course is to send this case back to the District Judge with directions which will prevent him repeating the mistake he has already made. If we make a new application without such directions, the error we complain of will become perpetual and Mrs. Woosey will be substantially without redress.

Provided the District Judge properly regards the English Order I admit that after hearing all the relevant evidence it is a matter for his discretion as to whether, acting upon the evidence and proper grounds, he acts in one way or another as allowed by s. 37 (4) of the Minor Offences Ordinance or whether he makes no order at all. The means of the respondent, Woosey, are clearly relevant to the exercise of such discretion, but the absence of means is not conclusive. No order to vary the sums payable has been applied for as it might have been under s. 37 (7) of the Minor Offences Ordinance. Compare the Army Act, 1881, s. 145 (4) and the Naval Discipline Act, s. 95 (a). Compare also the Money Payments (Justices Procedure) Act, 1935, s, 8, the provisions of which are not yet law in this Colony. Furthermore, in this case, I move for leave to read an affidavit which I have filed. It shows that there is more than a good prospect that if the case goes back we shall be able to prove that at the original hearing the District Judge had an inaccurate picture of Woosey's financial position before him, in that Woosey omitted to mention certain allowances which were most material. (The Court allowed the affidavit to be read). It is not suggested that the material in this affidavit, to wit. a letter, sent on the authority of a high Government Official, would in itself be a sufficient basis for asking for a substantive order in this Court, but it is submitted that it is an ample basis upon which to send the case back.

[**McELWAINE, C.J.**—Could not Counsel for Mrs. Woosey in the District Court have questioned Woosey about these matters?]

Yes. The opportunity to cross-examine, however, does not relieve a person giving substantive evidence from the obligation of telling the whole truth. It is not suggested that Woosey deliberately gave false evidence or a wrong impression, but he ought in the circumstances to have mentioned the allowance, and particularly the children's allowance.

Davies for Woosey. Having shown cause by proving that the amount of the maintenance he was paying was all that he reasonably could be called upon to pay having regard to his income, the defendant was acquitted and no appeal, except by the Deputy Public Prosecutor, lies against an acquittal. As Section 28 (3) of our Divorce Ordinance (Cap. 84) provides that the alimony pending suit must not be more than one-fifth of the husband's income, the English Order is invalid.

No reply was called.

Cur. Ad. Vult.

McELWAINE, C.J.—By an order of the English High Court of Justice, Probate, Divorce and Admiralty Division, (Divorce) made on 24th March, 1937 it was ordered that the respondent pay to the appellant as alimony pending suit £10 per month for herself and a further amount of £10 per month for the maintenance and education of the two children of the marriage, payment of both amounts to commence from the 9th January, 1937.

In the summons served on the defendant it was alleged that a copy of the order had been registered in the District Court in accordance with section 3 of the Reciprocal Enforcement of Maintenance Orders Ordinance (Chapter 47). The summons alleged that the respondent has made default in payments of a sum of £100 up to 9th September, 1937 and of a further £30 up to 18th November, 1937.

The summons required the respondent to appear before the Criminal District Court, Singapore on 13th January, 1938 to shew cause why action should not be taken against him under subsection 4 of section 37 of the Minor Offences Ordinance (Chapter 24).

The English order purported to be signed by the President of the Probate, Divorce and Admiralty Division. It was not a provisional order within the meaning of section 6 of the Reciprocal Enforcement of Maintenance Orders Ordinance (Chapter 47), although the payments were only ordered to be made pending suit.

From the date of registration the order was of the same force and effect, and, subject to the provisions of the Ordinance (Chapter 47), all proceedings may be taken on such order as if it had been an order originally obtained in the Dis-

trict Court and such Court has power to enforce the Order accodingly.

On the summons coming on for hearing before the District Judge the respondent, who is an Inspector on the Straits Settlements Police, shewed cause. He swore that his salary was $300 per month. He made no reference to allowances. He swore that he sent £10 a month to his wife and pays $12 per month under the Widows & Orphans Pension Ordinance. His present work does not require him to keep a motor car, so presumably he draws no motor car allowance. He pays no rent. He gave particulars of his expenditure.

After hearing counsel the learned District Judge gave the following judgment:—

> "In my opinion I should not enforce the order of the High Court. There is nothing to show why the High Court ordered payment of £20 per month and disregarded the defendant's offer. The cost of an appeal might have been prohibitive. In my opinion £10 per month is as much as defendant can pay (within reason).
>
> "I make no order on the notice."

From this adjudication the appellant now appeals. The principal grounds of appeal are:—

(a) that the District Judge had no jurisdiction to enquire into the grounds on which the said maintenance order was made in England;

(b) that there was no jurisdiction to enquire into the defendant's means, or, if there was such jurisdiction it could only be exercised with a view to assessing the manner of enforcement;

(c) that the District Judge was bound to make an order under one or other of the alternatives set out in section 37 (4).

Proceedings under section 37 (4) of the Minor Offences Ordinance may result in the imprisonment of the defendant, and to this extent they are criminal. It was decided by the full Court in *Chew Cheng Swee* v. *Chan Chye Neo* (1931 S.S.L.R. 187; 1 M.L.J., 5) that proceedings under what is now section 37 (1) were civil and that no appeal lay. It was there pointed out that subsection (4) approved a criminal process for recovery. I think proceedings under subsection (4) are criminal. See too *Rex* v. *Richardson*, (1909) 2 K.B. at p. 856.

Mr. Walters has satisfied me that the order made is not an "acquittal" so as to preclude an appeal by anyone other than the Public Prosecutor (Criminal Procedure Code, section 300). "No order" does not mean that the default alleged in the summons has not been proved. It does not mean that the defendant is found to be "not guilty" but merely that the Court refuses to levy by distress or to imprison the defendant.

"No order" cannot give rise to a plea of *autrefois acquit*. It does not give rise even to a plea of *res judicata*. It is more analogous to an order of discharge. *Public Prosecutor* v. *Abdul Hamid bin Jamal*, 3 M.L.J., 93.

Mr. Walters relied upon section 302 of the Code of Criminal Procedure (Chapter 21). Any person who is dissatisfied with any order pronounced by a District Court or Police Court in a criminal case or matter to which he is a party may appeal in respect of any error in law or in fact.

In applying this section to proceedings under section 37 (4) of the Minor Offences Ordinance it is important to notice that the word in section 37 (4) is "the Court may" not "the Court shall," and I see no duty with which the power is coupled, sufficient to shew that "may" means "must" in this subsection, as it was held to mean in the recent case of *De Keyser* v. *British Railway Traffic and Electric Co., Ltd.*, 52 T.L.R. 73. In my opinion section 37 (4) is purely discretionary, a view in which I am fortified by *Grocock* v. *Grocock* (1920) 1 K.B. 1.

If a Court makes an order under section 37 (4) imprisoning the defendant an appeal would lie, though I conceive it would seldom succeed, but it would be open to the defendant to appeal on the ground that no maintenance order was proved to have been made against him, or that he had proved that he had paid the full amount which the order directed him to pay. In such an appeal it would be open to the defendant to shew that the discretion was exercised following a wrong finding of fact.

Similarly I think an appeal would lie to a more limited extent if it could be shewn that the order had been refused because the magistrate had wrongly found that nothing was owing, but in this case the appeal would not result in the magistrate being reversed. The case would be sent back to the District Judge with a direction to him to exercise his discretion on a different basis of fact.

Similarly, if it can be shewn that for any reason wrong in law the District Judge exercised or refused to exercise his discretion, an appeal would succeed to the same extent, though I think that a mandamus to hear and determine according to law (as in *Rex* v. *Lancashire Justices. Ex parte Tyrer*, (1925) 1 K.B., 41 T.L.R., 103) would be the more regular procedure. On an application for mandamus the District Judge would have an opportunity to shew cause which might result in further material being laid before this Court.

The first part of the prayer in the petition of appeal "that an order be made in respect of the said order for maintenance by this Honourable Court for the purpose of enforcing it" cannot possibly be granted. The law vests the discretion in the District Judge or Police Magistrate and all that this Court can do is to see that the District Judge is not under a misapprehension as to law or fact when he approaches the consideration of how to exercise his discretion. This Court cannot dictate how the discretion is to be exercised. *Straits Steamship Company Ltd.* v. *Owen,* (1932) S.S.L.R. 145; 1 M.L.J., 167. But the prayer alternatively asks that the proceedings be remitted to the District Judge for further hearing. An additional ground for this course was an affidavit strongly suggesting that evidence could be produced to shew that the defendant receives $96 per month in allowance over and above the salary to which he deposed before the District Judge. This alternative prayer if acceded to would have very much the same effect as a mandamus.

The District Judge was not concerned with the reason why the English High Court ordered the husband to pay £20 per month. The fact is that the High Court did so order. The material on which it made the order is to be sought in London, not in Singapore and the propriety of that Order cannot be questioned by the District Judge. That Order having been registered is of the same force and effect as if it were an order made by the District Judge himself.

If a proper application were made under section 37 (7) the order might be varied on proof of change of circumstances but on such an application it would probably be proved that any change in the circumstances of the defendant was represented by an increase not a decrease in his emoluments and an increase would be no reason for decreasing his contribution towards the maintenance of his family.

No such application has been made in this case, and the District Judge was bound to consider the appellant's application on the basis of the order as registered being a good and valid order. *Rex* v. *Lancashire Justices. Ex parte Tyrer,* (1925) 1 K.B. 200, 41, T.L.R., 103.

It is argued that the District Judge challenged the validity of the order upon which the appellant's application before him was based. That argument is based upon the words of the District Judge "There is nothing to shew why the High Court ordered payment of £20 per month and disregarded the defendant's offer. The cost of an appeal might have been prohibitive." Mr. Davies has not attempted to shew that these remarks had any relevancy to the application before the District Judge. I think they do amount to an expression of disapproval of the English order and that in so disapproving the District Judge erred in law.

But that does not conclude the matter. He did not refuse to consider the application as the *Lancashire Justices* case (*supra*) did. He exercised his discretion. He might have exercised his discretion in the same way had he not challenged the validity of the order. He does not say that £10 per month is as much as the defendant *ought* to pay, but that it is as much as he *can* pay (within reason). I would here refer to *Rex* v. *Richardson,* (1909) 2 K.B. 851. At page 857 Lord Alverstone C.J. said "But in my opinion the Justices have jurisdiction to commit him (i.e. the husband) even though he has no means to pay. They would in practice, however, issue the warrant only if they thought that under the circumstances the man's omission to make the payments was deserving of punishment."

I also refer to *Grocock* v. *Grocock,* (1920) 1 K.B. at p. 15 "The Justices have no discretion enabling them to enforce the order partially. They must either enforce it as it stands or not at all."

Being an Inspector, the respondent is not protected by section 13 of the Police Force Ordinance (Chapter 177).

Mr. Davies' argument for the respondent before me consisted of two short assertions; first that the proceedings were criminal and had resulted in an acquittal, so the appellant could not appeal; and secondly, that as section 28 (3) of the Divorce Ordinance (Chapter 84) enacts that alimony pending suit shall not exceed one fifth of husband's income the Order of the English Divorce Court was invalid. The first argument I have already dealt with: the second cannot be taken seriously. If by the second argument Mr. Davies contended that the Order could not be registered in this Colony for an amount in excess of the amount which a Judge sitting in Divorce in the Colony could order the argument would not be ridiculous but it would be invalid. *Peagram* v. *Peagram,* (1926) K.B., 42 T.L.R., 530.

I have already intimated that the District Judge erred in criticising the English Order but that it does not follow that the exercise of his discretion was influenced by that error.

If the matter stood there I would have great doubt whether I should remit the case, but as in my opinion an application like that of the appellant can be made again and again to the District Court so long as the order is not obeyed, it will save the expense and delay of fresh proceedings

if I remit the case to the learned District Judge for further hearing and reconsideration on the basis:—

(a) that the Order to pay £20 per month cannot be questioned by him;

(b) that he must enforce the order as a whole or not at all;

(c) that even inability to pay is not a decisive factor though it is one to be taken into consideration before ordering imprisonment; and that inability to pay is less decisive in considering whether other methods of enforcement authorised by section 279 of the Criminal Procedure Code (Chapter 21) should be applied.

On the re-hearing the learned District Judge, will take into consideration such further evidence of the defendant's means as may be adduced before him.

In this connection I would refer to a remark made by Mr. Davies before me that the defendant had taken out an education policy. I have not seen that policy. If the point is made before the learned District Judge, he will consider whether the purpose in taking out the policy was wholly or in part to render the defendant unable to obey the order, and also who gets the benefit of the policy should the children die before it matures.

I direct that the case be remitted to the District Judge for further hearing and consideration.

Solicitors for the Appellant—
Allen & Gledhill.

Solicitors for the Respondent—
Aubrey Davies & Co.

[COURT OF CRIMINAL APPEAL]

McELWAINE, C.J., HALL, C.J. (F.M.S.) & TERRELL, J.

March 14, 1938.

YEO HOCK CHENG v. REX.

[SINGAPORE ASSIZE CASE No. 1 of 1938].

[CRIMINAL APPEAL No. 5 of 1938].

Evidence—statements alleged to have been made by a person since deceased—admissibility—Evidence Ordinance (Cap. 13), S. 32 (1).

The appellant was convicted of the murder of a Chinese girl Low Koh before Horne, J. and a special jury. At the trial two statements alleged to have been made by the deceased to her father and to her sister respectively, on different dates before her death, were admitted in evidence. The statement to her father was to the effect that she had denied sleeping at the appellant's house on a specified date because the appellant had threatened to, kill her if she told; and the statement to her sister was that she was going out with the appellant and that he had told her to wear man's clothing. The appellant appealed to the Court of Criminal Appeal.

Held on appeal, that the first statement could not be admitted under Section 32 (1) of the Evidence Ordinance in that the alleged threat contained in the statement was too remote and could not properly be treated as one of the circumstances of the transaction resulting in the accused's death.

Held further (McElwaine, C.J., dissenting), that the second statement was admissible in evidence on the ground that the arrangement made by the appellant for the deceased to go out with him and to wear man's clothing, presumably to avoid recognition, was a circumstance of the transaction which resulted in the deceased's death.

CRIMINAL APPEAL.

The grounds of appeal and the facts of the case appear sufficiently from the judgments below.

Tampoe-Phillips, for the Appellant.

Storr, Crown Counsel, for the Crown.

Cur. Ad. Vult.

McELWAINE, C.J.—The appellant was tried before Horne J. and a special Jury at Singapore Assize and convicted on 9th February 1938 of the murder on 14th March 1937 of a Chinese girl named Loh Koh.

He filed a petition of appeal on 12th February 1938 in which he set out the grounds of appeal as:

1. I am not satisfied with the judgment.
2. The sentence is against the weight of evidence.

On 15th February the trial Judge gave a certificate under paragraph (b) of Section 5 of the Court of Criminal Appeal Ordinance (Chapter 11) upon the following grounds:—

1. That it is questionable whether the evidence of statements alleged to have been made by the deceased:
   (a) on or about 3rd March, eleven days before her death to her father Low Kim Song;
   (b) on the evening of her death to her sister Low Seok Ngim
   are admissible under Section 32 (1) of the Evidence Ordinance (Chapter 13).
2. That it is questionable whether the evidence as a whole is not sufficient to justify the jury in giving a verdict of murder as there was no direct evidence as to the cause of death.

The Court assigned counsel to argue the appeal on behalf of the appellant and on 25th February he filed additional grounds of appeal. The first additional ground was shortly: That at the close of the prosecution there was no evidence